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No. 06-1570

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SUPREME COURT, U.S.

In the

Supreme Court of the United States

BERNARD PENZIEN and KAREN PENZIEN,
Petitioners,

v.

VILLAGE OF CAPAC,
a Michigan municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

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June 28, 2007

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QUESTIONS PRESENTED

1. Did the Michigan Court of Appeals correctly hold that due process was satisfied, where the Respondent provided notice which was reasonably calculated to give actual notice of the pendency of the proceedings to those with an interest in the property prior to any state action?

2. Did notice given to the taxpayer of record, in compliance with state statute and village ordinance, provide a constitutionally reasonable method of informing interested parties of the pendency of the proceedings prior to any state action?

3. Did the state statute/village ordinance, which provided for placement of a demolition lien on property after the Respondent complied with the requirements of the statute by giving notice reasonably calculated to apprise interested parties of the pendency of the proceedings, and after Respondent conducted a hearing and after judicial review, satisfy the due process requirements of the Fourteenth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Facts 1

B. Trial Court Proceedings 3

1. District Court 3

2. Circuit Court Litigation 4

C. Michigan Court of Appeals 4

D. Michigan Supreme Court 5

REASONS FOR DENYING THE PETITION 5

CONTRARY TO PETITIONERS' ASSERTIONS, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, RATHER, IT FAITHFULLY FOLLOWS PRECEDENT IN AN AREA OF CONSTITUTIONAL LAW WHICH IS NOW WELL-SETTLED. 5

A. The Due Process Requirements of the Constitution were Satisfied when Respondent Provided Written Notice which was Reasonably Calculated to Apprise Those with an Interest in the Property of the Pendency of the Proceedings 7

B. Respondent Complied with the Due Process Clause of the Fourteenth Amendment by Giving Notice which was "Reasonably Calculated" to Inform Petitioners of the Proceedings and an Opportunity to be Heard, Before Placing a Dangerous Building Assessment Lien on the Property. 14

C. M.C.L. 125.540 and Respondent's Ordinance are Constitutionally Sufficient as Applied to Petitioners, and Provided All the Procedural Protection which the Circumstances Required. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Blinn v. Nelson, 222 U.S. 1 (1911) 11

Brandon Twp. v. Tomkow,
211 Mich. App. 275; 535 N.W.2d 269 (1995) 7

Connecticut v. Doehr, 501 U.S. 1 (1991) 17

Dusenbery v. United States,
534 U.S. 161 (2002) . . . . . *passim*

Fuentes v. Shevin, 407 U.S. 67 (1972) 16, 17

Greene v. Lindsey, 456 U.S. 444 (1982) 8, 10

Jones v. Flowers,
547 U.S. 220; 126 S. Ct. 1708 (2006) . . . . . *passim*

Mathews v. Eldridge, 424 U.S. 319 (1976) . . . 18, 21, 22

Mennonite Bd. of Missions v. Adams,
462 U.S. 791 (1983) 7, 8, 11, 12

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) . 17, 18

Mullane v. Central Hanover Trust Co.,
339 U.S. 306 (1950) . . . . . *passim*

North Georgia Finishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601 (1975) 17

Paul v. Davis, 424 U.S. 693 (1976) 23

Peralta v. Heights Med. Ctr., Inc.,
485 U.S. 80 (1988) 16

Schroeder v. City of New York,
371 U.S. 208 (1962) 8, 10

Sniadach v. Family Finance Corp. of Bayview,
395 U.S. 337 (1969) 16

Tulsa Professional Collection Serv. v. Pope,
485 U.S. 478 (1988) 8, 10

Walker v. City of Hutchinson,
352 U.S. 112 (1956) 8, 10

Wisconsin v. Constantineau,
400 U.S. 433 (1971) 22, 23

Statutes

M.C.L. 125.540 . . . . . 6, 7, 19

M.C.L. 125.540(2) 2, 6

M.C.L. 125.541(6) 15

M.C.R. 2.116 (C)(10) 4

Other

Capac Village Code, Art. III, Sec. 6-68 2

Capac Village Code, Article III, Sec. 6-73 3

Respondent, Village of Capac, a Michigan municipal corporation, respectfully requests that this Court deny Petitioners, Bernard Penzien and Karen Penzien's, Petition for Writ of Certiorari (May 29, 2007) ("Petition"), seeking review of the opinion of the Michigan Court of Appeals dated June 29, 2006 and the Michigan Supreme Court's denial of Petitioners' Application for Leave to Appeal dated February 27, 2007. (Pet. App. A and B).

STATEMENT OF THE CASE

A. Facts

This litigation arises from Petitioners' claim that the Respondent, Village of Capac, violated their constitutional right to due process when it demolished a fire damaged building located on property which Petitioners had sold on land contract. The fire occurred in November 1999, and the building remained in damaged condition for over two years.

Petitioners sold the property on land contract in 1997, and in November 1998, the original land contract purchasers assigned their interest to Holmes Enterprises, Inc., a Michigan corporation. The land contract provided that the purchaser would be responsible for paying all taxes and assessments, and it was therefore Holmes' name which appeared on the tax rolls, rather than that of the Petitioners. Prior to 1999, Petitioners' names appeared as taxpayer of record on the Respondent's real property tax roll. (Pet. App. K, p. 49a).

In February 2002, more than two years after fire damaged the building on the property, Respondent ordered a structural inspection from an engineering company which revealed serious structural defects in the building, including one wall

which was "unstable and subject to collapse." (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. F, engineering report). Following receipt of the report, the Village conducted a dangerous building hearing on March 18, 2002. Pursuant to state statute and its local ordinance, notice was provided to "each owner or party in interest in the building or structure in whose name the property appears on the last local tax assessment records." (Pet. App. F, p. 34a, M.C.L. 125.540(2); Pet. App. E, p. 31a; Capac Vilage Code Art. III, Sec. 6-68. Notice). The only name which appeared on the last local tax assessment records was that of Holmes Enterprises, which received the notice and appeared at the hearing. At the hearing, the Council determined that notice had been served on the person whose name appeared in the most recent Village tax assessment records, and was also posted on the building. All "interested parties" had been allowed to address the Village Council, and the report of the Village Inspector had been given full consideration. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. G, Determination of Capac Village Council After Dangerous Building Hearing Regarding 101 and 103 South Main Street, Capac). The owner, Holmes, was given twenty (20) days to repair, demolish, or make safe the building. If action was not taken within that time, the Village would demolish the building, with the cost to be a lien against the real property on which the building was located and assessed on the next tax roll. (Id.). Petitioners were aware that the Respondent had conducted a public hearing and declared the building to be dangerous, but took no action to assert their interests. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. I).

Holmes challenged Respondent's determination in state Circuit Court, as provided for by Village ordinance. Article III, Sec. 6-73. (Pet. App. E, p. 32a). The circuit court entered judgment in favor of the Respondent Village on September 19, 2002. (Pet. App. M, p. 54a). It directed the Respondent to demolish the building with the cost to be a lien against the real property on which the building was located, and assessed against the real property on the next tax roll. The demolition began on October 23, 2002, at which time Petitioners attempted to intervene, but never filed their emergency motion. (Pet. App. N, 57a). Following demolition, the lien against the real property was recorded with the St. Clair County Register of Deeds in the amount of $51,239.00. (Pet. App. H).

B. Trial Court Proceedings

1. District Court

Following the demolition of the building, Holmes apparently failed to make certain payments due under the land contract, and in 2003, Petitioners filed a forfeiture action in state district court to regain the property. A Judgment of Possession After Land Contract Forfeiture was entered on March 26, 2003. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. M).

In the forfeiture action, Petitioners named not only Holmes, the assignee of the land contract vendee, but also Respondent, Village of Capac. On June 26, 2003, an "Order of Eviction Landlord-Tenants/Land Contract" was filed with the district court. The Writ of Restitution signed by the state judge directed the court officer to remove the named Defendants and other occupants from the premises and to

restore personal possession to the Plaintiffs. (Appellee's Response in Opposition to Appellants' Application for Leave to Appeal to Michigan Supreme Court, Apx. N).

2. Circuit Court Litigation

Petitioners filed suit in state circuit court in March 2004, alleging that the Respondent's demolition of the property was unconstitutional and seeking damages. Petitioner alleged a violation of procedural due process, inverse condemnation, violation of substantive due process, and trespass. (Count II - Count V). Count I was an action to quiet title, claiming that the equitable interest of Holmes was terminated and, thus, Respondent's lien on the real property was also extinguished. Respondent moved for summary disposition in its first responsive pleading. M.C.R. 2.116 (C)(10). The trial court granted Respondent's motion in part, dismissing Counts II-V, and specifically found that Petitioners' due process rights were not violated, and that notice was provided and was actually received by the land contract vendee, Holmes. Subsequently, the trial court granted Petitioners' motion for summary disposition of Count I, Action to Quiet Title, to remove the demolition lien from the property.

C. Michigan Court of Appeals

Both parties appealed the decision of the circuit court to the Michigan Court of Appeals. The Court of Appeals affirmed the lower court's decision dismissing Counts II-V, including Petitioners' claim of procedural due process. The court concluded:

> M.C.L. 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant [Capac] did not have

> any indication that the notice it sent did not notify the proper parties. The fact that plaintiffs [the Penziens] had an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of M.C.L. 125.540 are constitutionally insufficient." (Pet. App. B, 9a-10a).

The Court of Appeals reversed the trial court's decision removing the demolition lien from the property. It concluded that Petitioners' argument that the lien only attached to Holmes' equitable interest and not to the land was erroneous. (Pet. App. B, 12a). The land contract forfeiture proceedings could not remove the demolition lien which attached to the property itself. (Id.). The Court of Appeals rejected their argument that M.C.L. 125.540 was an unconstitutional due process violation. (Id., p. 13a).

D. Michigan Supreme Court

Petitioners filed an Application for Leave to Appeal to the Michigan Supreme Court, which was denied on June 29, 2006. (Pet. App. A). Petitioners now ask this Court to review the decision of the Michigan Court of Appeals.

REASONS FOR DENYING THE PETITION

CONTRARY TO PETITIONERS' ASSERTIONS, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, RATHER, IT FAITHFULLY FOLLOWS PRECEDENT IN AN AREA OF CONSTITUTIONAL LAW WHICH IS NOW WELL-SETTLED.

In an understandable attempt to transform their Petition into one worthy of review, Petitioners claim that the lower

court's opinion conflicts with this Court's precedent. Further, the Petitioners misstate the basis of Respondent's argument.

Admittedly, before a state may deprive any person of property, the Due Process Clause of the Fourteenth Amendment requires government to provide "notice and opportunity to be heard." ***Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)**. Due process does not, however, require actual notice of the proceedings. ***Dusenbery v. United States*, 534 U.S. 161, 170 (2002)**. Instead, opinions of this Court have allowed government to defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." ***Mullane*, 339 U.S. at 315**. M.C.L. 125.540 provided a means of giving notice that was reasonably calculated to give notice to interested parties. The Village attempted to provide actual notice to interested parties -- the state statute and Village ordinance required notice by mail "to the owner or party in interest in whose name the property appears on the last local tax assessment records." M.C.L. 125.540(2). That notice was "reasonably calculated" to provide notice to property owners - owners are generally responsible for payment of such taxes. And indeed, the notice was received by an owner of the property, Holmes, which appeared and contested the decision of the Respondent that the building was dangerous and must be repaired or demolished.

Because Petitioners required Holmes to pay the property taxes, Petitioners were not listed as owners on the local tax assessment records, and therefore did not receive actual notice. Moreover, although Holmes did receive notice, it did not inform Petitioners of the pendency of the proceedings. Prior to 1999, the tax rolls of the St. Clair County Treasurer designated the Penziens as taxpayers, as they acknowledge. (Pet. App. K, ¶ 6, p. 49a). The tax rolls were changed only

because Holmes was allowed to record the land contract assignment. (Pet. App. G, p. 18a). Petitioners' argument rests on the faulty premise that because they themselves did not receive actual notice (although Holmes did), there was no attempt to provide actual notice to them and due process was therefore violated. The Village did attempt to provide actual notice by mailing notice to the taxpayer of record, and that was all that was required. (See ***Dusenbery,* 534 U.S. at 170**, noting that ***Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983)** did not say "that the state *must provide* actual notice, but that it must *attempt to provide* actual notice." (Emphasis in original)). M.C.L. 125.540 provides for a means of giving notice which is "reasonably calculated" to give notice to the interested parties and therefore satisfied the Due Process requirements of the Fourteenth Amendment.

A. The Due Process Requirements of the Constitution were Satisfied when Respondent Provided Written Notice which was Reasonably Calculated to Apprise Those with an Interest in the Property of the Pendency of the Proceedings

Respondent agrees that Petitioners had a legally protected interest in the property which was afforded protection under the Due Process Clause of the Fourteenth Amendment. Both a titleholder and a land contract purchaser have a due process interest in the property that is subject to the land contract. ***Brandon Twp. v. Tomkow,* 211 Mich. App. 275, 282; 535 N.W.2d 269 (1995)**. The Village provided the Petitioners with all the process to which they were due by mailing notice of the pendency of the proceedings and demolition to the taxpayer of record as listed on the most recent Village tax assessment rolls. That was notice which was "reasonably calculated," under all the circumstances, to apprise interested parties of the action. ***Mullane, supra*, 339 U.S. at 314**. The

Michigan Court of Appeals stated that there was no dispute that the Village complied with the state statute requiring mailed notice to each owner and party in interest appearing on the tax rolls and by posting notice on the building. (Pet. App. B, p. 8a). Contrary to Petitioners' assertion, the Village attempted to provide actual notice to all owners by (1) mailing notice, and by (2) posting notice. That Petitioners did not receive actual notice was due to actions taken by them, not by any failure of the Village to provide notice "reasonably calculated" to inform them of the proceedings.

This is not a situation as Petitioners would have it, where Respondent attempted to provide notice simply by publication or posting[1]. Cases which found publication or posting alone to be inadequate to meet the requirements of due process are simply inapposite to the circumstances herein. Numerous cases have recognized the constitutional sufficiency of using the United States Postal Service to send notice to property owners as adequate, even when notice by publication was insufficient. ***Dusenbery*, 534 U.S. at 170, n. 4.**[2] Notice is not constitutionally insufficient simply because an interested party did not actually receive that notice prior to state action. ***Id.***

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[1] Although posting has been deemed by this Court to be not only constitutionally acceptable, but "a singularly appropriate and effective way of insuring that a person is actually apprised of proceedings against him." ***Greene v. Lindsey*, 456 U.S. 444, 452 (1982); *Jones v. Flowers*, 547 U.S. 220; 126 S. Ct. 1708, 1719 (2006).**

[2] For this proposition, ***Dusenbery*** cited ***Mullane*, 339 U.S. at 319; *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956); *Schroeder v. City of New York*, 371 U.S. 208, 214 (1962); *Mennonite*, 462 U.S. at 798;** and ***Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478, 490 (1988).**

Actually, the gist of Petitioners' argument is that the method of notice used by Respondent was not "reasonably calculated" to apprise those with an interest in the property of the pendency of the proceedings because it did not inform Petitioners. This is a difficult argument to make, as it is undisputed that one of the owners with an interest in the property, Holmes, actually received the notice and participated in the proceedings. In determining whether notice meets the "reasonably calculated" standard, ***Mullane*** supplies the appropriate analytical framework.

In ***Mullane***, this Court considered the issue of what constituted sufficient notice to the beneficiaries of a common trust fund under New York law that was facing judicial settlement. State law required only publication notice to the beneficiaries, in spite of the fact that the beneficiaries' rights to the fund would be terminated by the decree. **339 U.S. at 311**. The Court engaged in a balancing analysis between the state's interest in reaching a final settlement and the individual's interests in their property. The Court held that "notice, reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" was required. ***Id.*** **at 314**. Publication notice was sufficient for beneficiaries whose interests or addresses were unknown (***Id.*** **at 317**), however, "[w]here the names and post office addresses of those affected are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." **339 U.S. at 318**. The trustee had the names and addresses of the income beneficiaries already, and periodically remitted income to them. There was no reason to dispense with informing them of the proceedings. The Court expressly rejected the view that a search "under ordinary standards of diligence" was required, however. **339 U.S. at 317**.

In cases where this Court has concluded that notice was inadequate, it was not "reasonably calculated" to reach interested parties. See ***Walker,* 352 U.S. at 112,** (publication as sole notice to property owners inadequate to inform them of condemnation proceedings); ***Schroeder,* 371 U.S. at 208** (publication in two newspapers miles from owner's property, plus signs posted on trees in general vicinity inadequate to notify property owners of condemnation proceedings); ***Greene,* 456 U.S. at 444** (posting summons on door of tenant's apartment, under circumstances where notices were frequently removed, inadequate to notify tenants of eviction proceedings); ***Tulsa Professional,* 485 U.S. at 478,** (publication inadequate to inform creditors of institution of probate proceedings where known or "reasonably ascertainable;" for other creditors, publication can suffice).

The key focus is on the "reasonableness" of the means chosen by the state. ***Mullane,* 339 U.S. at 315**. The "reasonably calculated" standard is the benchmark for notice. It is left to the state to determine the form of service to adopt, balancing the "interests of the state with the individual interest sought to be protected by the Fourteenth Amendment." ***Id.* at 315**. In this instance, the state statute and Village ordinance mandated notice by mail, in addition to posting on the property. Notice was sent to the taxpayer of record. The state court reasonably concluded that this method of notice was calculated to alert interested parties to the proceedings. Petitioners repeatedly assert that they were not provided with actual notice of the proceedings, as if that fact alone was sufficient to conclude that notice was constitutionally inadequate. That is not the standard against which the Respondent's actions are measured. The form of service used by Respondent, in the great majority of cases, does inform interested parties of the pendency of proceedings, just as it did in this case. As recognized by *Mullane*, "[n]ow and then an

extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done." ***Id.*** **at 319, quoting** ***Blinn v. Nelson*****, 222 U.S. 1, 7 (1911).**

Petitioners rely heavily on ***Mennonite, supra***, to support their claim that actual receipt of notice was required to satisfy constitutional standards, rather than notice "reasonably calculated" to inform interested parties of the proceedings.

In ***Mennonite***, an Indiana statute required notice of sale of real property for nonpayment of taxes to be posted in the county courthouse, and notice by certified mail to be sent to property owners, but not to mortgagees. The property on which Mennonite held a mortgage was sold to the appellee, and Mennonite did not know of the sale until after the redemption period had run. This Court held that the mortgagee was entitled to notice of the pending tax sale and that publication and notice to the owner were insufficient. In ***Mennonite***, the tax sale would have nullified the mortgagee's interest "immediately and drastically." **462 U.S. at 798**. It is uncontroverted, however, that Petitioners', as titleholders, retain a significant interest in the land, even after its subordination to the demolition lien. Therefore, attachment of the lien did not immediately and drastically diminish Petitioners' interests in the same manner as the due process deprivation in ***Mennonite***.

More recently, in ***Dusenbery, supra,*** this Court reaffirmed its commitment to the "reasonably calculated" standard of ***Mullane***, noting, since ***Mullane*** was decided "we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice." **534 U.S. 161, 168**. In response to petitioner's argument that

the government failed to provide him with actual notice, in spite of the fact that he was in federal custody when notice was sent, ***Dusenbery*** clarified that actual notice has never been a requirement under ***Mullane.*** It distinguished ***Mennonite***, noting that ***Mennonite*** did not say that the state "*must provide*" actual notice, only that it must "*attempt to provide*" actual notice. ***Id.*** **at 170**.

Relying on ***Jones v. Flowers, supra***, the Michigan Court of Appeals rejected Plaintiffs' claim that despite the fact that Holmes was listed on the tax roll, the Village could easily have discovered Petitioners' names, and was required to do so.

> Plaintiffs' assert that despite the fact Holmes appeared on the tax rolls, and notice of demolition was sent to Holmes and allegedly posted on the building, the village could have easily discovered plaintiffs were the actual title holders and accordingly sent them notice.
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> * * *
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> We conclude that defendant's compliance with the statute adequately protected plaintiffs' due process rights.
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> * * *
>
> *Jones* stands for the proposition that a governmental entity does not have the obligation to search government records for a new address, and by inference is not required to perform a title search. M.C.L. 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant did not have any

> indication that the notice it sent did not notify the proper parties. The fact that plaintiffs had an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of M.C.L. 125.540 are constitutionally insufficient. ***Penzien v. Village of Capac,*** **unpublished opinion per curiam of the Court of Appeals, Nos. 259536, 259540, dated June 29, 2006.** (Pet. App. B, 6a, 8a 9a).

Here, Respondent made "reasonably diligent efforts" to inform interested parties. The Due Process Clause does not require "heroic efforts," it only requires that the government effort be "reasonably calculated" to inform interested parties. ***Dusenbery,*** **534 U.S. at 170**. Once Respondent made a constitutionally sufficient effort to attempt to provide actual notice to interested parties – by mailing notice to the owner or party in interest in whose name the property appeared on the last local tax assessment records, and by posting notice on the building – there can be no constitutional claim. The means chosen by the state statute and Village ordinance balanced the interest of the state with the individual interest to be protected by the Due Process Clause. ***Mullane,*** **339 U.S. at 314**. It is up to the state to determine what form of service to adopt, and states have taken a variety of approaches. ***Jones v. Flowers,*** **547 U.S. 220 (2006)**.

In most circumstances, mailed notice to owners or parties in interest listed on the tax records will be actual notice to those parties, as it was in this case, where Holmes received the notice and appeared to oppose the Respondent's determination to demolish the building. The totality of the circumstances is what determines the sufficiency of notice. The method chosen by state statute and Village ordinance generally provide interested parties the ability to protect their

interests. The Respondent had a vital interest in safeguarding the health and welfare of its citizens by having a fire damaged building either repaired or demolished. After demolition, it had an equally important interest in collecting the funds which it expended to accomplish the demolition. Assessment of taxes occurs on a regular basis, and use of the tax assessor's records was therefore "reasonably calculated" to provide Respondent with the name and address of those with an interest in the property. Petitioners had the ability to safeguard their interests with minimum effort, by listing themselves on the tax rolls so that any notices would come to their attention. Indeed, they were listed until 1999, when they allowed Holmes to record its interest, which added its name and address, and removed their's. This was not a situation where there was no practical way for Petitioners to learn of government action which affected their property interests. The Due Process Clause does not require the government to save petitioners from their own lack of care where they fail to protect their interest, despite the ability to do so.

B. Respondent Complied with the Due Process Clause of the Fourteenth Amendment by Giving Notice which was "Reasonably Calculated" to Inform Petitioners of the Proceedings and an Opportunity to be Heard, Before Placing a Dangerous Building Assessment Lien on the Property.

Petitioners raise the same argument as that advanced in Section A, *supra*, that failure to provide Petitioners with actual receipt of notice of demolition proceedings before placement of the demolition lien on the property violated due process. This Court has never required actual notice, only notice "reasonably calculated" to apprise interested parties of the pendency of the proceedings. ***Dusenbery, supra* at 170**. Notice provided in accord with state statute and Village

ordinance was constitutionally sufficient because notice to the taxpayer of record was "reasonably calculated" to provide actual notice to Petitioners, and Respondent "heard nothing back indicating that anything had gone awry." ***Jones, supra*, 547 U.S. 220; 126 S. Ct. at 1714**. Petitioners' claim that Respondent "changed the tax records to reflect the interest of Holmes, [and therefore] Petitioners were not provided notice of any proceedings" (Petitioners' Brief, p. 21) is not factually accurate. Obviously, Respondent did not unilaterally effect this change; it was done because Petitioners acquiesced in the substitution of Holmes as taxpayer of record in place of Petitioners, based on Petitioners' requirement that the land contract vendee pay the property taxes. Notice was sent to the owner, Holmes, but because of this change to the tax records (and because Holmes did not inform Petitioners), Petitioners were no longer listed as taxpayers of record and did not receive actual notice.

Nonetheless, Petitioners were aware of the proceedings. They were aware that the Respondent had declared the building to be dangerous during a public hearing, but took no action. (Appellee's Response to Appellants' Application for Leave to Appeal in Michigan Supreme Court, Apx. I). Finally, they attempted to intervene at the time demolition began, thus they had actual notice prior to demolition and prior to attachment of the demolition lien. M.C.L. 125.541(6) provides for attachment thirty (30) days after notice to interested parties if those parties fail to pay the cost. (Pet. App. F, p. 34a). Petitioners could have taken action, but failed to do so apparently due to their assumption that only the interest of Holmes, the land contract vendee, was affected by the lien.

Cases cited by Petitioners to support their argument that they received no notice and that therefore the statute is

unconstitutional, are dissimilar to the circumstances here. In cases cited by Petitioners, a statute authorized pre-judgment attachment of property without prior notice or a prior hearing. In contrast, M.C.L. 125.540 and the Village ordinance provide for both prior notice and hearing.

In ***Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988)**, there was no attempt to provide either actual or constructive notice. **485 U.S. at 81-84**. A default judgment was entered against Peralta in a suit by Heights Medical Center to recover a sum due for a hospital debt which he had guaranteed for one of his employees. Peralta learned of the judgment only after his property had been sold at a great discount. He attempted to set aside a default judgment because he was never served and had no notice of the suit. This Court noted that due process required notice "reasonably calculated" to apprise him of the pendency of the action against him, citing ***Mullane, supra***.

In ***Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969)**, this Court held that a Wisconsin statute permitting pre-judgment garnishment of a debtor's wages without prior notice or hearing violated the Due Process Clause of the Fourteenth Amendment. The Court noted that the statute allowed a court clerk rather than a judge to garnish a defendant's wages at the request of the creditor's attorney. ***Id.* at 338**.

***Fuentes v. Shevin*, 407 U.S. 67 (1972)** invalidated Florida and Pennsylvania replevin statutes on due process grounds. The Florida statute allowed a creditor to seize personal property of a debtor without a showing of probable cause, without judicial supervision, and without prior notice or hearing. ***Id.* at 73-74**. The Pennsylvania statute not only lacked the same procedural safeguards as the Florida statute,

but also failed to provide for a post-deprivation hearing. ***Id.* at 75.** Although the creditor was required to post a security bond, the Court found procedural safeguards to be inadequate.

In ***Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)**, the Court declined to strike down a Louisiana statute that permitted a creditor/lienholder to seek the sequestration of disputed goods in an *ex parte* proceeding. The statute required the creditor to present an affidavit to a judge and post a security bond and required the judge to hold a post-deprivation hearing immediately. It allowed the debtor to regain interim possession of the property by filing a substitute bond.

In ***North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)**, Georgia's pre-judgment garnishment statute was struck down. It allowed a creditor to obtain an *ex parte* writ garnishing a debtor's bank account after submitting an affidavit containing only conclusory allegations to a court clerk. The Court held that the statute violated the Due Process Clause because it lacked any requirement for an affidavit of probable cause or judicial oversight and included no provision for a hearing.

In ***Connecticut v. Doehr*, 501 U.S. 1 (1991)**, Connecticut's *ex parte* pre-judgment attachment statute was found unconstitutional because it did not provide for a pre-disposition hearing, and thus, violated due process. The plaintiff applied to state court for an attachment on Doehr's home in connection with a civil suit for assault and battery which he was instituting against Doehr in the same court. The application was supported by a "skeletal" affidavit. Doehr received notice only after the sheriff attached his property.

In ***Doehr***, this Court applied the factors cited in ***Mathews v. Eldridge,* 424 U.S. 319 (1976)**, and concluded that without pre-attachment notice and hearing, the risk of erroneous deprivation was too great to satisfy due process and the interests in favor of *ex parte* attachment were too minimal to justify burdening Doehr's ownership rights without a hearing to determine the likelihood of recovery, where the effect on Doehr's property was significant.[3]

Admittedly, imposition of a demolition lien would impair Petitioners' ability to sell and would cloud title to the property. However, the risk of erroneous deprivation was far lower here than in ***Doehr***, where attachment of Doehr's house was as security for a possible judgment on an assault and battery claim. ***Doehr*** noted that "[u]nlike determining the existence of a debt or delinquent payments, the issue does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.'" ***Doehr,* 501 U.S. at 14, quoting *Mitchell,* 416 U.S. at 609**. Here, determining the cost of the demolition lien was both uncomplicated and easy to document.

The third prong of the ***Doehr*** test examined the interests of the plaintiff. In ***Doehr***, the only interest in attachment was to insure availability of assets if plaintiff prevailed on the merits of his tort action. **501 U.S. at 14**. Unlike the plaintiff

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[3] ***Dusenbery, supra***, held that the ***Mullane*** test of reasonableness under the circumstances, rather than ***Mathews v. Eldridge*** supplied the appropriate analytical framework for the due process analysis. ***Dusenbery*, 534 U.S. at 161, 168**. ("... [W]e have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since ***Mullane*** was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice.")

in ***Doehr***, this was not a tort action, but was to determine the existence and amount of a lien which lends itself to accurate assessment (and of course, the circumstances also differ from ***Doehr***, because Respondent provided written notice to parties in interest, who actually appeared). Respondent had a strong interest in insuring that the danger to the public was removed and that the cost to do so was not a charge on the taxpayers. The procedure in M.C.L. 125.540 differed markedly from that of the cases cited by Petitioners. The Michigan Court of Appeals rejected Petitioners' claim that M.C.L. 125.540 was unconstitutional on its face:

> To the extent that plaintiffs' raise a facial challenge to the constitutionality of M.C.L. 125.540, we conclude that in most instances notice provided pursuant to the statute will provide actual notice to the property owner, and therefore, plaintiffs' facial challenge fails. (Pet. App. B, p. 10a).

The facts here to do not fall into the category of cases which ***Doehr*** sought to distinguish. Respondent expended a significant sum to demolish the dangerous building. The necessity for the demolition was established at the March 18, 2002 hearing. Respondent attempted to provide actual written notice to those with an interest in the property. One who had such an interest, Holmes, received the notice, appeared at the hearing, and later contested that determination in state court. The state court issued a judgment in Respondent's favor, allowing the demolition. Prior notice and hearing were provided for by M.C.L. 125.540 and Village ordinance, unlike the cases cited by Petitioner. The risk of erroneous deprivation was likewise low because the facts of the underlying claim were easily documented, unlike a tort action.

Constitutionally sufficient notice was provided to Petitioners, and consequently no due process violation occurred.

C. M.C.L. 125.540 and Respondent's Ordinance are Constitutionally Sufficient as Applied to Petitioners, and Provided All the Procedural Protection which the Circumstances Required.

Once again, Petitioners claim that any statute that fails to require receipt of actual notice to them, as an owner of property, violates the Due Process Clause. (Petitioner's Brief, p. 24). Once again, Respondent asserts that due process does not require that the state "provide *actual notice*," but only that it must "*attempt to provide actual notice.*" ***Dusenbery,* 534 U.S. at 170**. (Emphasis in original). The "reasonableness" standard of ***Mullane*** governs. The government may defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." ***Mullane,* 339 U.S. at 315**.

As the Michigan Court of Appeals reasoned:

> All of plaintiffs' claims for damages are based on an allegation that plaintiffs were deprived of their procedural due process rights when defendant demolished the building without notice to them. Plaintiffs claim due process requires notice be given to a land contract vendor. Plaintiffs also claim that the village ordinance and the state statute that defendant relied on to give notice are unconstitutional.

* * *

> [I]t is clear that plaintiffs have a due process interest in the land. However, due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery, supra* at 170-171. (Pet. App. B, 6a, 7a).

The Court of Appeals concluded that the statute provided for a means of giving notice which was reasonably calculated to give notice to interested parties.

Indeed, one of the owners of the property received notice, appeared, and contested the Respondent's determination regarding the condition of the building. Petitioners acknowledge that fact. The statute and ordinance are "reasonably calculated" to convey the necessary information to Petitioners and, are thus, compliant with due process. Respondent sent notice which was received by an owner of the property. The government is not constitutionally obligated to seek alternative means of notice when a generally reasonable notice procedure fails in a particular situation, unless there is something to alert it that the notice was not received. Only then is it required to take additional steps, "if practicable to do so." ***Jones*, 547 U.S. 220; 126 S. Ct. at 1718**. Among the reasonable options cited by ***Jones*** was posting on the property (which the statute required and which Respondent did). But there is no obligation to search government records for a new address. ***Id.* at 1719**. Under these circumstances, there was no unconstitutionality.

Even utilizing the balancing test of ***Mathews v. Eldridge, supra***, which analyzed the requirements of due process in administrative proceedings, respondents complied with constitutional requirements. ***Mathews*** determined that an evidentiary hearing prior to termination of Social Security

Disability benefits was not required. It considered the private interest affected, the risk of erroneous deprivation, and the government's interest, including administrative burdens that additional procedural requirements would entail. **424 U.S. at 334-335**.

Although the interest affected by the termination of disability benefits might be significant, this concern was offset by the existence of other possible sources of income which would become available following termination of benefits. The reliability of the pre-termination procedures was an additional procedural safeguard. This Court acknowledged that an erroneous administrative decision could occur, "[b]ut the procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." ***Id.* at 344**.

A review of these factors provides support for the Michigan Court of Appeals' decision. The interest affected by the demolition lien is significant, but Petitioners retain a significant interest in the property as titleholders. Moreover, the demolition conveyed a benefit to Petitioners by removing a dangerous and fire damaged building from the property which was a potential liability to them. The procedure used to determine the necessity for and cost of demolition was accurate and reliable. The state court reviewed the procedures utilized and approved the cost of demolition. Finally, the administrative burden on Respondent to conduct additional searches for other interested parties when the method of notice used was reasonable and Respondent had no indication that notice was not received, was not required by due process.

***Wisconsin v. Constantineau*, 400 U.S. 433 (1971)** cited by Petitioners, is factually dissimilar and does not alter this

conclusion. In ***Constantineau***, a Wisconsin statute gave the chief of police the power to post notice in all retail liquor stores that sales/gifts of liquor to defendant were forbidden for one year. No notice or hearing was provided prior to the posting. This Court realized such posting would expose an individual to embarrassment and ridicule, in effect "a badge of infamy." ***Id.* at 437**. The stigma of being banned publicly constituted a denial of due process. ***Id.* at 436-437**. The one year ban on the purchase of alcohol was invalid because no notice was given and no hearing held.

Paul v. Davis*, 424 U.S. 693 (1976)** interpreted ***Constantineau to recognize a state law entitlement to "freely purchase goods." This liberty interest was entitled to procedural due process. In contrast, here notice was given and a hearing was held prior to any action by the Village. Petitioners' constant repetition that their failure to receive actual notice renders the Respondent's actions unconstitutional and a violation of their due process rights ignores the considerable body of law which requires the government's attempt to provide notice must only be "reasonable" under the circumstances. ***Mullane, supra***. The fact that a title search might have disclosed additional information to the Respondent is irrelevant. ***Jones*** held that there was no duty to search government records, even after the state was aware that notice was not received. ***Jones*, 547 U.S. 220; 126 S. Ct. at 1719 (2006)**. One of the additional steps suggested by ***Jones*** was to post notice - a step which was taken by Respondent.

The statute and ordinance were "reasonably calculated" to convey the necessary information to Petitioners. ***Mullane*, 339 U.S. at 314**. Respondent sent notice to the taxpayer of record, who received it and who had an interest in the property along with the Petitioners. Petitioners' interests were represented at the hearing, which was actually attended

by Holmes. "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all." ***Id.* at 319**. Respondent attempted to provide actual notice to the Petitioners, and also posted notice. It was not constitutionally obligated to seek alternative means of notice when a generally reasonable notice procedure failed in a particular situation and the Respondent was unaware of that fact.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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